

WALTER VAUGHN)	
Claimant)	
)	
VS.)	
)	
ICL PERFORMANCE PRODUCTS)	
Respondent)	Docket No. 1,033,564
)	
AND)	
)	
INS. CO. OF STATE OF PENNSYLVANIA)	
Insurance Carrier)	

The ALJ found that the claimant has a 30.5 percent functional impairment to his right shoulder based on the ratings of Dr. Peter Bieri and Dr. Daniel Zimmerman. In making his decision, the ALJ expressly disregarded the opinions offered by Dr. Craig Vosburgh, the treating physician.

The respondent requests review of the nature and extent of claimant's disability. Respondent argues that the Board should reject the ALJ's dismissal of Dr. Vosburgh's medical opinions and find that the claimant suffered a 20 percent impairment to his right shoulder, or in the alternative, average the opinions of Dr. Vosburgh and Dr. Bieri (27 percent) and find that the claimant has a 23.5 percent impairment.¹

Claimant argues that the ALJ's Award should be affirmed in all respects as the ALJ's decision to disregard Dr. Vosburgh's opinions was justified under the circumstances.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Award should be affirmed.

The only issue in dispute in this matter is the nature and extent of claimant's permanent impairment to his right shoulder. Claimant sustained a compensable injury while in respondent's employ, and was provided with treatment that included surgery to his shoulder. There is no question that claimant had a less than optimal recovery from his surgery and as a result, he received a lengthy period of post-surgical physical therapy, and although he reports continued problems with pain, an inability to sleep through the night, and restrictions in his movements, he has returned to the workplace at another position that accommodates the restrictions imposed by Dr. Vosburgh the treating physician.

As noted by the ALJ, Dr. Vosburgh testified that claimant "has maintained motion about the shoulder". But the ALJ went on to note that Dr. Vosburgh did not measure claimant's range of motion on the day of his report nor did he even see claimant on that occasion. Instead, Dr. Vosburgh testified that he last examined claimant on October 4, 2007 and then authored his report on the 21st of that month.

Dr. Vosburgh went on to explain that he believed claimant does not truly have a limitation of motion in his shoulder, but that his ongoing complaints of weakness are due to nerve damage. Thus, his impairment does not account for any range of motion deficits. Ultimately he assessed claimant's permanent impairment at 20 percent. When asked if his opinion was rendered by utilizing the *Guides*, he rather ambiguously testified that "[u]sing that reference as a reference, yes, I believe it is."² Dr. Vosburgh did not volunteer, nor was he asked to explain his rating any further.

¹ All references to ratings are to the right shoulder, a scheduled injury, pursuant to K.S.A. 44-510d. And all references are to the 4th edition of the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*.

² Vosburgh Depo. at 15.

Claimant was also evaluated by two other physicians. At claimant's request, Dr. Zimmerman evaluated and assessed claimant with a 34 percent permanent impairment based on the range of motion model as set forth in the 4th edition of the *Guides*.

Dr. Bieri was appointed to serve as an independent medical examiner and he assigned claimant a 27 percent impairment. This is comprised of 13 percent for the loss of range of motion and 16 percent for weakness to the shoulder.

In reviewing the evidence, the ALJ concluded that Dr. Vosburgh's opinions were compromised because he issued an opinion based upon a belief that claimant had maintained the range of motion to his shoulder when in fact, he had not examined claimant on that particular day. Thus, the ALJ disregarded Dr. Vosburgh's opinions relying instead on those offered by Drs. Zimmerman and Bieri, both of whom rated claimant's impairment and noted a significant loss in range of motion.

After considering the entire record along with the parties' arguments, the Board finds no reason to disturb the ALJ's findings and conclusions and therefore affirms the Award in its entirety. The Board notes that although the ALJ was apparently troubled by the fact that Dr. Vosburgh issued his report on October 21, 2006, a date that he did not see claimant, Dr. Vosburgh testified that he examined claimant on October 4, 2006, he had treated claimant for over a year and his records clearly reflect some awareness of claimant's issues related to his range of motion limitations. That factor alone would not seem to justify a total disregard for his opinions. However, the Board is troubled by the fact that while he seemed to reference the *Guides* when asked, he was rather vague on how he actually used the *Guides* in assigning his rating. Moreover, he provided a somewhat confusing explanation for why he failed to rate claimant's range of motion deficits. Dr. Vosburgh testified that he believed claimant's range of motion problems were caused by nerve damage rather than true range of motion limitations and that his 20 percent rating reflects that damage. He seemed to believe that any further rating of the claimant's loss of range of motion would duplicate that deficit. Yet, both Drs. Zimmerman and Bieri rated claimant's range of motion loss and substantiated their opinions in some detail referencing the relevant portions of the *Guides*.

Like the ALJ, the Board is more persuaded by the opinions offered by Drs. Zimmerman and Bieri and therefore finds the ALJ's decision to average their impairment findings to be reasonable under these facts and circumstances. The ALJ's Award is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 30, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frederick J. Patton, Attorney for Claimant
Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge